DOCKET FILE COPY ORIGINAL

LAW OFFICES

ROSS & HARDIES

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

888 SIXTEENTH STREET, N.W.

WASHINGTON, D.C. 20006-4103

202-296-8600

TELECOPIER
202-296-8791

150 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS 60601-7567
312-558-1000

PARK AVENUE TOWER
65 EAST 55TH STREET
NEW YORK, NEW YORK 10022-3219
212-421-6555

580 HOWARD AVENUE
SOMERSET, NEW JERSEY 08875-6739
908-563-2700

STEPHEN R. ROSS

July 28, 1993

HAND-DELIVERED

RECEIVED

JUL 28 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Regulation, MM Docket No. 92-266

Dear Mr. Caton:

Enclosed on behalf of InterMedia Partners, are the original and four copies of InterMedia's Petition for Stay in the above-referenced proceeding.

Please address any questions concerning these Comments to the undersigned.

Cordially,

Stephen R. Ross

SRR/sdb
Enclosure

No. of Copies rec'd 0+4

DOCKET FILE COPY ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of:	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	MM Docket No. 92-266
Protection and Competition	)	
Act of 1992	)	
	)	
Rate Regulation	)	

PETITION FOR STAY

Stephen R. Ross
Kathryn A. Hutton

Ross & Hardies
888 - 16th Street, N.W.
Suite 300
Washington, D.C. 20006
(202)296-8600

Dated: July 28, 1993

TABLE OF CONTENTS

SUMMARY

InterMedia Partners hereby submits this Petition for

Should the Commission grant this request for stay, InterMedia proposes that the Commission continue its freeze on cable television rates during the pendency of the Commission's rulemaking on cost-of-service standards and reconsideration proceeding. If the freeze continues past January 1, 1994, InterMedia proposes that frozen rates be adjusted for inflation and other external costs.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	MM Docket No. 92-266
Protection and Competition	)	
Act of 1992	)	
	)	
Rate Regulation	)	

PETITION FOR STAY

InterMedia Partners and its affiliates ("InterMedia"), by its attorneys, hereby petitions the Federal Communications Commission ("FCC" or "Commission"), pursuant to 47 C.F.R. Sections 1.43 and 1.44 for a stay of the Commission's Report & Order, FCC 93-117, released May 3, 1993, as modified July 27, 1993, FCC 93-372, in the above-referenced proceeding. InterMedia seeks a stay of the Report & Order, scheduled to become effective on September 1, 1993, until 30 days after the FCC issues a final Order in response to the Notice of Proposed Rulemaking ("NPRM") on cost-of-service standards,[1] and resolves the outstanding issues raised in the Petitions for Reconsideration of the Report & Order.

InterMedia serves over 640,000 cable television subscribers throughout the United States, and is directly affected by the regulations adopted in the Report & Order. InterMedia also participated in the Commission's rulemaking by

---

[1] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, "Notice of Proposed Rulemaking," MM Docket No. 93-215, FCC 93-353, released July 16, 1993.

filing both comments and reply comments. Accordingly, InterMedia has standing to file this Petition.

I. Introduction and Background

On May 3, 1993, the Commission informed cable operators that it had adopted a "benchmark" method of rate regulation pursuant to the requirements of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act"). Under the FCC's benchmark regulation, cable operators must make complex calculations using the FCC's worksheets to determine its base rate per channel. This base rate per channel is compared to the FCC's benchmark tables set forth in the Report & Order. If the operator's rates are at or below the benchmark, its rates are presumptively lawful.

Rates above the benchmark are presumed to be unlawful. In this case the operator has two options. Under the first option, the operator must rollback its rates to those in effect on September 30, 1992. If the September rates are still above

it promised to do, namely, inform cable operators how price caps are to be used on a going-forward basis, and prescribe a methodology for calculating external programming costs.[2]

On June 4, 1993, InterMedia filed a "Petition for Stay" of the Report & Order pending the outcome of the cost-of-service rulemaking on the grounds set forth below.[3] On June 15, 1993, the Commission deferred the effective date of the cable rate regulation until October 1, 1993 because, at that time, Congress had not yet approved the supplemental appropriation requested by the Commission to implement the provisions of the Act.[4] The Commission dismissed InterMedia's Petition without prejudice, stating that "we do not find it necessary to address at this time the Coalition and InterMedia requests for stay."

In support of its decision to delay the implementation date until October 1, Chairman Quello stated:

> We are concerned about our legal responsibilities in implementing these rules. Thus, a chaotic rush to regulation by an understaffed and underfinanced Commission would reflect on the integrity and efficiency of the Commission's processes, and result in a flood of legal challenges that could take year to unravel.

---

[2] "Forms prescribing the precise methodology for calculating and allocating external costs and applying the price cap regime on a going-forward basis will be released shortly." Report & Order at ¶ 253, n.604.

[3] The Coalition of Small System Operators, Prime Cable of Alaska, and Daniels Cablevision also filed Petitions for Stay.

[4] Implementation of Sections of the Cable Television Consumer Protection and Competition Act, Rate Regulation, "Deferral Order," FCC 93-304, MM Docket No. 92-266, released June 15, 1993.

* * *

> Let us underscore one final point: franchise authorities and other interested parties are now proceeding on the understanding that implementation will not occur prior to October 1; their planning is firmly based on that assumption. Under these circumstances, to advance the date having already deferred it . . . adds to the confusion and forces additional expenditures on planning to comply with another, earlier implementation date.

Letter from Chairman Quello to Hon. John Dingell, Cong. Rec. at H4472 (July 1, 1993).

On June 21, 1993 over fifty Petitions for Reconsideration of the Report & Order were filed. Virtually all of the petitioners assert that the methodology upon which the benchmarks is based is flawed.[5] Supporting these allegations with expert economic analysis and factual examples, there is substantial evidence in the record indicating, among other things, that: (1) the "10% competitive differential" found by the Commission to be the difference between systems subject to effective competition and systems not subject to effective competition is wrong; (2) deriving benchmark rates for nearly 30,000 cable community units based solely on the revenue information of just 141 community units (out of a total of only 1,107 units surveyed) is unsupportable as a statistical and empirical model; (3) the FCC's failure to consider homes density on cable operators' rates results in confiscatory rates for cable

---

[5] See, e.g., Petitions for Reconsideration filed by: National Cable Television Association (with supporting economic analysis); Time Warner Entertainment; Coalition of Small System Operators; and Corning/Scientific Atlanta.

systems serving rural areas; and (4) the benchmark formula is fundamentally flawed because the costs of upgrades and rebuilds are not taken into account in the benchmark tables. At present, the costs of capital improvements are only recoverable through cost-of-service showings and InterMedia has budgeted to spend $14,411,361 for capital improvements in 1993.[6] These are only some of the unintended economic effects of the present benchmark rules. Numerous additional legal issues with respect to the Commission's benchmark scheme and its interpretation of the Act are also pending in the Reconsideration proceeding.[7]

On July 16, 1993, the Commission released the cost-of-service NPRM wherein the Commission indicated its intention to adopt traditional Title II common carrier rate regulation for cable system cost-of-service showings. Recognizing that the reconsideration and cost-of-service issues are inextricably intertwined, cable operators were placed on notice that "we are concurrently with the instant proceeding addressing petitions for reconsideration of the Report & Order."[8] Thus, operators may expect that the benchmark rules may change considerably at some

---

[6] This figure does not include the $1,900,000 spent to rebuild InterMedia's Kauai system in the aftermath Hurricane

point well after September 1.[9] In addition, the current pleading cycle in the NPRM closes on September 14, 1993, two weeks after operators are supposed to choose between benchmark and cost-of-service regulation.

On July 20, 1993, bowing to Congressional pressure, Chairman Quello issued a press release stating that the effective date of cable rate regulation would be moved forward from October 1, 1993 to September 1, 1993.[10] On July 27, 1993, the FCC released its Order changing the effective date to September 1, 1993, waiving certain notice requirements, and deferring from October 1 to November 15, 1993, the date which cable operators must respond to an initial notice of regulation from the franchise authority.

As stated more fully herein, InterMedia submits that implementation of the Commission's Report & Order without resolution of the substantial issues pending on reconsideration, and without uniform cost-of-service standards is arbitrary and capricious, would cause InterMedia irreparable injury, and is not in the public interest.

---

[9] Given that the Commission has emphatically stated that benchmark regulation is to be the "primary" method of regulation, and given that the vast majority of cable operators have no choice under the present benchmark scheme but to submit cost-of-service showings in order to receive compensatory rates, substantial changes must be made to the benchmarks if benchmarks are to be the "primary" method of regulation. See, discussion at p. 21, infra.

[10] The press release noted that the decision was "influenced in part by the possibility that the Congressional advocates of the September 1 date could express displeasure by cutting FCC's future funding to administer the Cable Act."

II. Benchmarks in Place Without Cost-of-Service Standards Creates a Dilemma for Cable Operators

As the Commission is well aware, the benchmark rate will not always adequately compensate the operator for its costs. The Commission recognizes that application of the benchmark rate, in certain instances, would be confiscatory. As the Commission stated:

> [W]e cannot be certain that the initial capped rate defined through benchmark comparisons will permit all cable operators to fully recover the costs of providing basic tier service and to continue to attract capital. We do not believe that Congress intended that cable operators could, or should, be compelled to provide basic service tier service at rates that do not recover such costs. Accordingly, we believe that

that operators will be able to attract capital and lines of credit.

Under traditional ratemaking principles, the essential elements of rate of return regulation "require[s] determinations relating to four major cost components: rate base; cost of capital; depreciation; and operating expenses." Report & Order at ¶ 265. To these cost components, an operator is entitled to add the prescribed rate of return. The Commission's Report & Order does not identify which costs may be included in the rate base, nor has it stated which costs may be recovered as operating expenses.[10] Indeed, the Commission emphasized that "cost accounting and cost allocation requirements can significantly affect rates and the way cable operators currently conduct business." Id. at ¶ 558. Nevertheless, such requirements are not specified. In addition, the Commission has not identified a "reasonable" rate of return, indicated how cost of capital will be calculated, or prescribed a depreciation rate.

In fact, the NPRM raises more questions than it answers. While the Commission tentatively suggests that a reasonable rate of return may be between 10% and 14%, this range is meaningless given that the FCC proposes to adopt a "rate of return for regulated cable service [based on] the rate of return of a surrogate industry or activity." NPRM at ¶ 48. The myriad

---

[10] The Commission is quick to note that "of course, the fact that an operator has incurred a cost does not establish its right to recover that cost from subscribers. The extent to which costs may be recovered from subscribers will be governed by [the non-existent] cost-of-service standards." Id. at ¶ 262, n. 619.

of as yet unidentified variables required for such an analysis was outlined by the Commission:

> We propose [to choose] a surrogate that has comparable risk to that of the cable

value of a cable system as a going concern. The inclusion or exclusion of such assets from the ratebase will have a significant impact on cable operators. See, Declaration of Karen J. Linder, Exhibit 2.

Furthermore, the valuation methodology selected by the Commission to determine the value of cable system plant will "affect the amount of 'excess' acquisition costs that could be disallowed from the ratebase" and will "have a significant impact on the industry." NPRM at ¶ 34. Again, the Commission has merely raised significant issues, and the industry is left with no clear direction or notice as to what cost-of-service standards will be adopted.

The Commission recognizes that the issues raised in the benchmark reconsideration proceeding are inextricably intertwined with cost-of-service issues. "On reconsideration, we will be examining the role of cost-of-service requirements in our regulation of cable service rates and their relationship to benchmark and price cap requirements." NPRM at ¶ 7, n.10. Given the pleading cycles established in both the reconsideration proceeding and the cost-of-service rulemaking,[11] it is extremely doubtful that the Commission will be able to resolve these related issues until after January 1, 1994. Between September 1, 1993 and the final resolution of these matters, operators are

---

[11] Oppositions/comments in the reconsideration proceeding were filed on July 21; replies will be due on August 2. Comments in the cost-of-service NPRM are due August 25, and replies are due September 14.

left with either benchmark rates (which the Commission has indicated need to be substantially revised) or common carrier type cost-of-service showings adjudicated by largely inexperienced franchise authorities.[13]

Until cost-of-service standards are adopted, an operator must submit a cost-of-service showing to the franchise authority if it desires to maintain existing rates above the benchmark. Franchise authorities may "prescribe any rate that is justified by the cost showing, including a rate lower than the benchmark or the operator's current rate level." Report & Order at ¶ 273 (emphasis added).[14] Without any standards to follow, the cable operator "assumes the risk that its rate could be lowered," and there is no limit on the amount that the rate may be lowered. Id. Allowing franchise authorities the interim power to determine standards to review cost-of-service showings will virtually guarantee the multiplicity of standards and the confusion that the FCC specifically stated it intends to avoid by requiring franchise authorities to comply with uniform federal standards. Id. at ¶ 270. Thus, InterMedia, which operates in 575 different franchise areas, is facing regulatory scrutiny by more than 575 separate regulating bodies.

---

[13] Although the Commission has extended, until November 15, 1993, the date operators must respond to an initial notice of regulation, cable operators must still set their rate structures by September 1, 1993. July 27 Order at ¶ 8. Therefore, the November 15, 1993 date is irrelevant for purposes of determining whether a given system must opt for benchmarks or cost-of-service.

[14] See also, NPRM at ¶ 5, n.9.

Nevertheless, the Commission expects InterMedia to make a reasoned business decision whether to rollback above-benchmark rates to the benchmark, or submit cost-of-service showings for which the Commission has yet to develop standards or rules. If InterMedia chooses to apply the benchmark table to its rates, then rates will be reduced, as much as 10% below the rates in effect on September 30, 1992. If InterMedia pursues a cost-of-service showing before the local franchise authority, there is no way for InterMedia to anticipate which of its basic tier costs will be determined by the franchise authority to be recoverable or what rate of return will be deemed reasonable. The franchise authority could order a rate reduction well in excess of 10% below September 30 levels. While cable operators may seek FCC review of franchise authority decisions, which the FCC will review on a "case-by-case basis," this ad hoc approach does not assist cable operators in making reasoned business decisions or preparing meaningful cost-of-service showings. Id. at ¶ 272.

Until the FCC itself resolves the reconsideration issues and adopts cost-of-service standards, it cannot process cost-of-service appeals or handle cable programming service complaints[13] since the criteria for evaluating whether a given rate is "reasonable" do not exist. As the discussions between the FCC and Congress regarding supplemental appropriations make

---

[13] Again, the FCC merely states that it will review such showings on a case-by-case basis, although operators will be permitted to maintaining existing rates pending the resolution of the compliant. Report & Order at ¶ 271, n.637.

clear, the FCC does not have the staff to devote to cost-of-service appeals or cable programming complaints in any event.[14] Thus, it appears that the Commission simply intends to stay cable programming cost-of-service showings until standards are adopted and staff is available.

The Commission's proposal to impose full Title II common carrier rate regulation on the cable industry is intended to discourage cable operators from pursuing cost-of-service showings, and encourage them to acquiesce to benchmark rate reductions, irrespective of the operator's actual costs. Properly defined cost-of-service standards and a prescribed rate of return would give operators the ability to provide meaningful cost-of-service showings, and weigh the costs and benefits of either complying with the benchmark rate or providing a cost-of-service justification for higher rates.

The Commission concedes that application of the benchmark would be confiscatory where the benchmark rate does not allow a fair rate of return. The benchmark rate scheme does not stand on its own, nor is it so intended. Accordingly, these rate regulations cannot go into effect without standards in place to justify above-benchmark rates. The Commission's determination to implement these regulations on September 1, 1993 without cost-of-service standards in place is arbitrary and capricious.

---

[14] See, Cong. Rec. at H4472-73.

III. A Stay of the Report & Order is Required

InterMedia is entitled to a stay if it can show: (1) that it will incur irreparable injury; (2) the likelihood of success on the merits; (3) that a stay will not harm other interested parties; and (4) that a stay is in the public interest. See, Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669 (D.C.Cir. 1985); Washington Metro. Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C.Cir. 1977); Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921, 925 (D.C.Cir. 1958).

A. Implementation of These Regulations Without Cost-of-Service Standards Will Cause Irreparable Harm to InterMedia

InterMedia operates approximately 19 cable system groups throughout the United States. A number of these systems' current rates exceed the FCC's benchmark rate. Nevertheless, InterMedia believes that its current rates are justified based on its costs. As shown below, implementation of the Commission's rate regulations in their current form will cause InterMedia irreparable harm for which there is no adequate legal remedy.

In franchise areas where InterMedia's rates are above the benchmark, InterMedia must, pursuant to the FCC's Report & Order, either reduce its rates up to 10% below September 30, 1992 levels, or submit a cost-of-service showing. If InterMedia reduces rates to the benchmark in certain franchise areas, InterMedia will not have sufficient funds to implement system upgrades or improve and expand its services, as required by its

franchise agreements. It will also impair InterMedia's ability to obtain bank financing. See, Declarations of David G. Rozzelle, Esq. and Karen J. Linder, attached as Exhibits 1 and 2. The benchmark rates, in their current form, will make bank financing difficult to obtain by the industry in general.[15]

If InterMedia is unable to comply with franchise requirements to upgrade its systems, the franchise may be revoked. InterMedia is thus facing the potential destruction of its business in these franchise areas. The destruction of a business is an economic injury that constitutes irreparable harm and warrants the issuance of a stay. Washington Area Transit Comm'n., supra, 559 F.2d at 843, n.2. See also, Jacobson & Co. v. Armstrong Cork Co., 548 F.2d 438 (2d. Cir. 1977)(loss of franchise or distributorship constitutes irreparable harm). Moreover, a rate rollback is an uncompensable monetary loss; InterMedia cannot recover lost revenues from the franchise authority or its subscribers.

On the other hand, InterMedia cannot produce a meaningful cost-of-service showing because there exist neither standards nor a prescribed rate of return related thereto. If InterMedia cannot produce a cost-of-service showing and maintains its existing, justifiable rates, it will be in violation of the Commission's Report & Order, and the Communications Act of 1934,

---

[15] See, Letter to the FCC from Bank of America and 17 other banks dated June 21, 1993, MM Docket No. 92-266.

as amended.[18] Violation of an Order of the FCC, or the

that of the petitioners in Abbott Laboratories who were forced to choose between incurring substantial costs to comply with drug labeling requirements or continuing to use a type of label that "they believe in good faith meets the statutory requirements" and risk prosecution. Here, InterMedia believes in good faith that its existing above-benchmark rates are justified by its costs.

gathered by the FCC in its cable television rate survey.[17] The direct costs and the joint and common costs of obtaining and

> required on the basic tier and the portion of the properly allocated joint common costs of the cable operator incurred in providing the basic service tier.

Id. The Commission's failure to follow Congress' directive to account for these specific cost factors, and to prescribe a rate of return, invalidates the Commission's regulations. In reviewing an agency's construction of a statute, the first question is:

> whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron, U.S.A., Inc. v. Natural Resources Defense, 467 U.S. 837, 842-43 (1984). The situation here is no different from American Civil Liberties Union v. F.C.C., 823 F.2d 1554 (D.C.Cir), cert. denied, Connecticut v. F.C.C., 485 U.S. 959 (1987). There, the Circuit Court rejected the FCC's definition of "basic cable service" which differed from the 1984 Cable Act's definition.[18] The Court observed that:

> the statute speaks with crystalline clarity. It provides a precise definition in section 602(2) for the exact term the Commission now seeks to redefine. The statute in no wise indicates that the 602(2) definition is only transitory. From the face of the statute

---

[18] Section 602(2) of the 1984 Cable Act defined "basic cable service" as "any service tier which includes the retransmission of local television broadcast signals." In contrast, the FCC defined this term as "the tier of service regularly provided to all subscribers that includes the retransmission of all must-carry broadcast signals . . and the public educational and governmental channels, if required by the franchise authority."

> then, we are left with no ambiguity and thus no need to resort to legislative history for clarification.

823 F.2d at 1568. In the 1992 Cable Act, Congress clearly and unequivocally addressed this precise issue. It directed the Commission to account for both direct costs and joint and common costs in promulgating rate regulations, and to prescribe a "reasonable profit" or rate of return. It is obvious from the Commission's Report & Order that cost-of-service showings are intended to account for these factors, and that the Commission will in the future prescribe a rate of return. There is no indication in the statutory language or in the legislative history that Congress intended the Commission to prescribe what amounts to "interim procedures" at variance with the statute's specific directives.

In addition, the NPRM indicates the Commission's intention to adopt full Title II common carrier regulation for cable television cost-of-service showings. This is expressly contrary to the legislative history of the Act which states:

> It is not the Committee's intention to replicate Title II regulation. The FCC should create a formula that is uncomplicated to implement, administer, and enforce, and should avoid creating a cable equivalent of a common carrier 'cost allocation manual.'

House Report 102-628 at 83. In response to this Congressional instruction, the FCC concludes that its cost-of-service proposal "will not contravene the statute" because:

> Although it was Congress' expectation that cable rates should not be regulated in the same manner as common carriers, we believe